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84-973

No.....

In The

Supreme Court of the United States

1984 Term

———o———

EMIL ROTHENBERGER, on behalf of himself and all others similarly situated,

Petitioners,

v.

DOUGLAS COUNTY,

Respondents.

———o———

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

PETITION FOR CERTIORARI

———o———

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QUESTIONS PRESENTED FOR REVIEW

I

Does an employer's failure to post the notice required by 29 U.S.C. Sec. 627 toll the 180 day limitation period under the circumstances of this case?

II

Can a District Court resolve factual issues regarding tolling as a matter of law on disputed facts?

III

Does a complaint asserting a policy intended to deny pension benefits to members of the protected age group state a claim for relief under the ADEA as a matter of law?

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GROUNDS FOR JURISDICTION

This is a review of a decision of the Eighth Circuit Court of Appeals affirming dismissal of a complaint under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*, the Due Process Clause of the Fourteenth Amendment, and various pendent claims.

The Eighth Circuit entered its order affirming dismissal of this complaint on June 20, 1984. The order was filed by the Clerk on June 25, 1984.

On July 26, 1984, the Eighth Circuit denied Appellant's Motion for Rehearing, and the order of denial was entered by the Clerk on July 30, 1984.

Jurisdiction of this Court is requested under the authority of 28 U.S.C. 1254(1).

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Constitution Amendment Fourteen, Sec. 1:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Age Discrimination in Employment Act, 29 U.S.C. Sec. 623(a):

   (a) Employer practices. It shall be unlawful for an employer—

   (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

3. Age Discrimination in Employment Act, 29 U.S.C. Sec. 626(d):

> (d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this Section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 14(b) [29 USCA Sec. 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

4. Age Discrimination in Employment Act, 29 U.S.C. Sec. 27:

> Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act [29 U.S.C. Sec. 621 *et seq.*]

STATEMENT OF THE CASE

The complaint which is the subject of this petition alleged that Respondent Douglas County maintained a non-disclosed policy to deny County employees within the protected age group of the opportunity to participate in the South Dakota Pension Plan. Since it is a matter of South

Dakota law that State governmental employees may not participate in any pension plan other than the State plan, this policy thereby precluded Petitioner's participation in any pension plan. The complaint asserts Respondent's action in furtherance of this policy took place in May of 1974, and resulted in Petitioner's irrevocable exclusion from substantial pension benefits. The complaint also asserted that the policy continued to the present time.

On Motion to Dismiss, Respondent raised the 180-day limitation for filing a charge of discrimination. Affidavits attached thereto denied any concealment or policy to discriminate, and asserted that the decision was based on cost considerations.

Affidavits attached to Plaintiff's response asserted that Plaintiff only discovered the existence of the policy when on September 9, 1982, a Commissioner of Respondent Douglas County threatened to harm the political career of the incumbent Auditor if the pension plan issue was presented by petition to the Board of County Commissioners. Affiants asserted that up to that time, they had no notice of the Defendant's policy to deny benefits to those within the protected age group. The charge of discrimination was filed within 180 days after discovery of the policy.

Also raised was the failure of the Defendant to post the notice required by 29 U.S.C. Sec. 627. Defendant's reply concedes by affidavit that no notice advising employees of the protections of the ADEA was posted in accordance with 29 U.S.C. Sec. 627.

The District Court dismissed the action, finding "no basis herein for any equitable tolling of the limitation period. The Plaintiff clearly knew or should have known that Douglas County did not join the State Plan in 1974,

and any reason or motive behind such failure to join the Plan would not toll the statute."

The Court also rejected Plaintiff's continuing violation theory, with the words: "Counsel has cited no authority for the proposition that the failure to adopt a pension plan constitutes a violation of the ADEA, and I haven't found any such authority. I conclude therefrom that the Defendant has no obligation under the ADEA to adopt a pension plan for its employees." Due process as a basis for the action was also denied for the same reason.

Finally, the District Court ruled that the retaliation claim failed to state a cause of action, and the pendent claims were therefore dismissed for lack of supporting federal jurisdiction.

The Eighth Circuit Court of Appeals affirmed "based on the well-reasoned decision of the District Court."

———o———

ARGUMENT IN SUPPORT OF PETITION

The Eighth Circuit has by implication decided that neither equitable grounds nor a violation of the posting requirement justifies tolling of the 180-day limitation period of 29 U.S.C. Sec. 626(d)(1). This appears to conflict directly with the principles of *Zipes v. TWA,* 445 U.S. 385, 102 S.Ct. 1127 (1982) and *Oscar Meyer v. Evans,* 441 U.S. 750, 99 S.Ct. 2066 (1979).

This case was decided on a Motion to Dismiss and conflicting affidavits. Four other circuits have ruled that a plaintiff raising the doctrine of tolling is entitled to an evidentiary hearing on disputed facts. *Bonham v. Dresser Industries, Inc.,* 569 F.2d 187 (3rd Cir. 1977), cert. den. 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *Kephart*

v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978), cert. den. 450 U.S. 959 (1981); *Vance v. Whirlpool,* 716 F.2d 1010 (4th Cir. 1983); and *Ott v. Midland-Ross Corp.,* 600 F.2d 24 (6th Cir. 1979).

Generally, an employers' failure to post has been held to justify equitable tolling. However, this decision now brings to three the number of Circuits applying the opposite rule. *Wilkerson v. Siegfried Insurance Agency,* 683 F.2d 344 (10th Cir. 1982); *Kazanzas v. Walt Disney,* 704 F.2d 1527 (11th Cir. 1983), cert. den. — U.S. —, 104 S.Ct. 425 (1983); and *Posey v. Skyline Corp.,* 702 F.2d 102 (7th Cir. 1983) Certiorari has been denied in the past on both sides of the growing controversy, but the number of cases in which the issue is raised may justify resolution of the issue at this point, especially where, as here, the issue is clearly presented on a Motion to Dismiss.

This Court's recent decision in *Arizona Governing Committee v. Norris,* — U.S. —, 77 L.Ed.2d 1236, 103 S.Ct. — (1983), opened the door to consideration of an issue whose time has come: do pension benefits by their nature impact older workers on a disproportionate basis, just as pregnancy benefits impact females, and if so, are there any restrictions on the manner in which an employer can adopt or administer pension benefits? *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), applies substantive due process to the administration of pregnancy benefits. Here, the facts raising the procedural due process violation were prevented from being presented to a jury by the order of dismissal.

The Eighth Circuit has decided this important but unresolved question of federal law in a manner which interprets the ADEA to prevent a challenge to employee

pension benefits regardless of the intent of the employer or impact on workers within the protected age group. This interpretation should be reviewed by this Court in light of the numerous decisions by this and other courts applying disparate impact theory in ADEA cases.

Dated this 23rd day of October, 1984.

Respectfully submitted,

/s/ Valerie McNaughton
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Attorneys for Petitioners

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing Petition for Certiorari in the United States Mails with postage prepaid, on the 23rd day of October, 1984, and a corrected copy of the foregoing on this 16th day of November, 1984, addressed to the following:

David Weinstein
Karen, Morrison and Savikas
5720 Sears Tower
233 South Wacker Drive
Chicago, IL 60606

James W. Olson, Esq.
Douglas County States Attorney
Armour, S.D. 57313

/s/ Valerie McNaughton

CERTIFICATE OF COMPLIANCE WITH 28 U.S.C. SEC. 2101(c)

Valerie McNaughton, one of the attorneys for the Petitioners, hereby certifies that she mailed a true and correct copy of the foregoing Petition for Certiorari by Federal Express Mail with postage prepaid, addressed to:

Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

on the 23rd of October, 1984, and that same was filed in the Supreme Court on October 24, 1984, as indicated by the attached date-stamped cover page.

Dated this 16th day of November, 1984.

/s/ Valerie McNaughton

EXHIBIT 1

IN THE SUPREME COURT
OF THE UNITED STATES

1984 Term

———o———

EMIL ROTHENBERGER, on behalf of himself and all others similarly situated,

Petitioners,

v.

DOUGLAS COUNTY

Respondents.

———o———

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

———o———

PETITION FOR CERTIORARI

(Received October 24, 1984)

———o———

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1125

Emil Rothenberger, on behalf of himself and all others similarly situated,

Appellant,

v.

Douglas County,

Appellee.

Appeal from the United States District Court
for the District of South Dakota

Submitted: June 12, 1984

Filed: June 20, 1984

Before HEANEY and JOHN R. GIBSON, Circuit Judges, and HANSON,* Senior District Judge.

---

*The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

ORDER

(Filed June 25, 1984)

Emil Rothenberger, an employee of Douglas County in South Dakota, sued the county on behalf of himself and other similarly situated individuals alleging that the county's failure to participate in the state retirement plan violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982); the due process clause; and unspecified state law. The district court dismissed the action with prejudice concluding that Rothenberger filed his complaint with the Equal Employment Opportunity Commission after the 180-day limitation period had run and that his complaints of retaliation and due process violations failed to state causes of action. Rothenberger appeals this dismissal.

We have carefully considered the briefs of both parties, the record on appeal, the district court's opinion, and the parties' oral arguments. Finding no error of law or fact, we affirm based on the well-reasoned decision of the district court. *See* 8th Cir. R. 14.

A true copy.

Attest:
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

NOTICE OF ENTRY
Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court to the District of South Dakota on the 25th day of June, 1984.

/s/ William F. Clayton
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION
CIV83-4117

EMIL ROTHENBERGER, on behalf of himself and all others similarily situated,

Plaintiff,

vs.

DOUGLAS COUNTY,

Defendant.

JUDGMENT OF DISMISSAL

The Court having entered its Memorandum Opinion and Order of Dismissal in this matter and after consideration of the same, it is hereby

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Complaint be dismissed upon the merits, with prejudice and without costs.

Dated this 19th day of December, 1983.

/s/ William F. Clayton, Clerk

NOTICE OF ENTRY
Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court to the District of South Dakota on the 19th day of December, 1983.

/s/ William F. Clayton
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DISTRICT
CIV 83-4117

EMIL ROTHENBERGER, on behalf of himself and all others similiarly situated,

Plaintiff,

vs.

DOUGLAS COUNTY,

Defendant.

(Filed Dec. 19, 1983)

APPEARANCES:

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For the Defendant.....Messrs. Robert L. Timm,
Grant Gormley and
Thomas H. Harmon
Attorney General's Office
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Pierre, SD 57501

MEMORANDUM OPINION
AND
ORDER OF DISMISSAL

The South Dakota legislature consolidated all state and local retirement systems by Chapter 35, Session Laws of 1974, now S.D.C.L. 3-12. The consolidation was effective July 1, 1974.

Under the statute, there was some benefit to the employees of local subdivisions if the local subdivisions set up retirement plans prior to July 1, 1974. Douglas County chose not to do so on or about May 23, 1974, and let the July 1, 1974 deadline pass without action.

In this action, the plaintiff asserts that the failure of Douglas County to so act violated the Age Discrimination in Employment Act (ADEA). Plaintiff makes other pendent claims.

The defendant has moved to dismiss the ADEA claim because the plaintiff didn't file a discrimination complaint with the EEOC within 180 days of the county action or inaction, as required by 29 U.S.C. § 626(d). Plaintiff presented his complaint to the EEOC on December 21, 1982.

I conclude that the motion to dismiss should be granted, and the action dismissed with prejudice.

Plaintiff seeks to avoid the application of the 180-day limitation period by asserting that there is a continuing violation of the ADEA. I conclude that this position is without merit. Counsel has cited no authority for the proposition that the failure to adopt a pension plan constitutes a violation of ADEA, and I haven't found any such authority. I conclude therefrom that the defendant had no obligation under ADEA to adopt a pension plan for its employees.

The plaintiff also asserts that the 180-day limitation period should be tolled, but I find no basis herein for any equitable tolling of the limitation period. The plaintiff clearly knew or should have known that Douglas County did not join the State Plan in 1974, and any reason or

motive behind such failure to join the plan would not toll the statute.

Plaintiff also asserts a due process claim based on the Fourteenth Amendment to the United States Constitution. I conclude that the failure of the defendant to adopt a pension plan does not give rise to a due process claim, as a matter of law.

I also conclude that the retaliation claim set forth in the complaint fails to state a cause of action.

Because the federal claims must be dismissed, it follows that the pendent claims must otherwise be dismissed.

ORDER OF DISMISSAL

Upon the record herein and the foregoing Memorandum Opinion,

IT IS ORDERED AND ADJUDGED:

(1) That the defendant's Motion to Dismiss is hereby granted.

(2) That the above-entitled action be and hereby is dismissed with prejudice.

Dated this 19th day of December, 1983.

BY THE COURT

/s/ JOHN P. JONES
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, Clerk

By /s/ LINDA M. ZIEGLER
Deputy
(SEAL)

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court to the District of South Dakota on the 19th day of December, 1983.

/s/ William F. Clayton
Clerk

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1983

84-1125-SD.

EMIL ROTHENBERGER, ETC.,

Appellant,

vs.

DOUGLAS COUNTY,

Appellee.

Appeal from the United States District Court
for the District of South Dakota

(Filed July 30, 1984)

Appellant's petition for rehearing having been considered by the Court, is hereby denied.

July 26, 1984

Copy to Judges: Heaney
John R. Gibson
Hanson
Mr. David Maland
Mr. William F. Clayton, Clerk (CIV 83-4117)
West Publishing Company